Case No. 95813-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CNA APARTMENTS, LLC, and EILEEN, LLC,

Respondents,

v.

CITY OF SEATTLE,

Appellant.

AMICUS CURIAE BRIEF OF FUTUREWISE

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I. INTRODUCTION

Mr. Chong Yim, Ms. MariLyn Yim, Ms. Kelly Lyles, Ms. Beth Bylund, the CNA Apartments, and Eileen, LLC (the Yims) argue that the First-in-Time Rule adopted by Seattle Municipal Code (SMC) 14.08.050, the "FIT" Rule, is an unconstitutional taking because it destroys a fundamental attribute of property ownership.[1] While Washington purports to follow the U.S. Constitution's taking law,[2] federal takings law does not recognize as a taking a claim that a regulation destroys a fundamental attribute of property ownership other than a physical occupation.[3] As this brief will document, there are other inconsistencies between Washington takings law and the takings law under the U.S. Constitution. These inconsistencies are both incorrect and harmful. This case is an opportunity for that Washington State Supreme Court to clarify Washington takings law and to bring it into line with the U.S. Constitution.

II. IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Futurewise is a statewide nonprofit organization that works throughout Washington State to support land-use policies that encourage healthy, equitable and opportunity-rich communities, and that protect our

[1] Respondents' Brief at 7 – 17.
[2] *Orion Corp. v. State*, 109 Wn.2d 621, 657 – 58, 747 P.2d 1062, 1082 (1987).
[3] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 – 40, 125 S. Ct. 2074, 2081 – 82, 161 L. Ed. 2d 876 (2005).

most valuable farmlands, forests, and water resources. Futurewise's interests include environmental stewardship and effective and just comprehensive planning.

III. STATEMENT OF THE CASE

Futurewise relies on the statement of the case in the City of Seattle's Opening Brief.

IV. ARGUMENT

A. As Washington decisions have claimed, Washington should follow federal takings law.

1. Standard of Review.

This Court follows the plain text:

> "When interpreting constitutional provisions, we look first to the plain language of the text and will accord it its reasonable interpretation. … The words of the text will be given their common and ordinary meaning, as determined at the time they were drafted." *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004) (citations omitted). We need not look to legislative history if the provision is unambiguous. *Heavey*, 138 Wn.2d at 811, 982 P.2d 611.[4]

Washington "courts have assigned the burden of proof to the property owner to establish that a taking occurred."[5]

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[4] *Washington Off Highway Vehicle All. v. State*, 176 Wn. 2d 225, 234 – 35, 290 P.3d 954, 959 (2012).

[5] *Keene Valley Ventures, Inc. v. City of Richland*, 174 Wn. App. 219, 225, 298 P.3d 121, 125 (2013) *accord Guimont v. Clarke*, 121 Wn.2d 586, 599 – 600, 854 P.2d 1, 8 – 9 (1993).

2. The "true doctrine of *stare decisis*."

This Court recognizes stare decisis is not a bar to change, but a function of whether existing law is incorrect and harmful:

> *Stare decisis* is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office. But we also recognize that stability should not be confused with perpetuity. If the law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires. The true doctrine of *stare decisis* is compatible with this function of the courts. The doctrine requires a clear showing that an established rule is incorrect and harmful before it is abandoned.[6]

3. Washington purports to follow the federal takings law.

Washington's takings decisions claim to follow the U.S. Constitution's takings law. As this Court wrote in *Orion Corp. v. State*, "in order to avoid exacerbating the confusion surrounding the regulatory takings doctrine, and because the federal approach may in some instance provide broader protection, we will apply the federal analysis to review all regulatory takings claims, including Orion's."[7] The same concerns apply today. There continues to be confusion around Washington takings law

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[6] *In re Stranger Creek & Tributaries in Stevens Cty.*, 77 Wn.2d 649, 653, 466 P.2d 508, 511 (1970).
[7] *Orion Corp. v. State*, 109 Wn.2d 621, 657 – 58, 747 P.2d 1062, 1082 (1987).

and, at least in some circumstances, the takings law under the U.S. Constitution is more protective than Washington takings law.[8] This case is an opportunity for this Court to resolve those concerns.

The City of Seattle's Opening Brief on pages 34 through 39 analyzes U.S. and Washington takings law.[9] The U.S. Constitution's takings law does not include whether the regulation destroys a "fundamental attribute of ownership, including the right to possess, to exclude others, to dispose of property" other than a physical occupation, the "'harm prevention'/'benefit conferral' dichotomy," or whether "the regulation substantially advances legitimate state interests."[10] These differences are not based on differences between the state and federal constitutions. Both the state and federal rules are based on the U.S. Constitution.[11] The following subsections analyze why these rules are both incorrect and harmful.

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[8] Jeffrey M. Eustis, *Square Pegs in Round Holes: The Washington Courts' Misapplication of Federal Regulatory Takings Law*, 4 SEATTLE J. ENVTL. L. 1, 3 (2014).
[9] *See also* Roger D. Wynne, *The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 WASH. L. REV. 125, 132 – 39 (2011).
[10] *Guimont*, 121 Wn.2d at 604, 603, 595, 854 P.2d at 11, 10, 6 (1993); *Lingle*, 544 U.S. at 538 – 40, 125 S. Ct. at 2081 – 82.
[11] *Guimont*, 121 Wn.2d at 593 – 98, 854 P.2d at 5 – 8.

4. Federal takings law does not recognize destroying a fundamental attribute of ownership, other than a physical occupation, as part of the taking analysis.

Federal law does not recognize destroying a fundamental attribute of ownership, other than a physical occupation, as part of the takings analysis.[12] While the *Kaiser Aetna* decision is sometimes cited for proposition that the right to exclude is a fundamental attribute of ownership[13], there the actual "taking" was caused by a physical invasion.[14] In that decision, the owner of a pond in Hawaii dredged a channel connecting it to Maunalua Bay and the Pacific Ocean.[15] The U.S. Army Corps of Engineers "acquiesced" to this proposal.[16] After the work was complete, the Corps of Engineers contended that the pond owner could not deny the public access to the pond because connecting it to the ocean had made the pond a navigable water of the United States.[17] While the Supreme Court agreed the pond met the definition of a navigable water and was subject to regulation by the Corps, "it does not follow that the pond is also subject to a public right of access."[18] The Court wrote:

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[12] *Lingle*, 544 U.S. at 538 – 40, 125 S. Ct. at 2081 – 82.
[13] *See for example*, *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996) *cert. denied Corn v. City of Lauderdale*, 522 U.S. 981, (1997).
[14] *Kaiser Aetna v. United States*, 444 U.S. 164, 179 – 80, 100 S. Ct. 383, 393, 62 L. Ed. 2d 332 (1979).
[15] *Kaiser Aetna*, 444 U.S. at 167, 100 S. Ct. at 386.
[16] *Id.*
[17] *Kaiser Aetna*, 444 U.S. at 168, 100 S. Ct. at 387.
[18] *Kaiser Aetna*, 444 U.S. at 172 – 73, 100 S. Ct. at 389.

> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. …. And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.[19]

Later U.S. Supreme Court decisions, including *Loretto,*[20] *Lingle,* and *Yee,*[21] have analyzed the *Kaiser Aetna* decision as a physical invasion case. As the *Lingle* Court wrote:

> The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. *See Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831–832, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Loretto*, supra, at 433, 102 S.Ct. 3164; *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)."[22]

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[19] *Kaiser Aetna*, 444 U.S. at 179 – 80, 100 S. Ct. at 393.
[20] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 102 S. Ct. 3164, 3174 – 75, 73 L. Ed. 2d 868 (1982).
[21] *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 528, 112 S. Ct. 1522, 1528, 118 L. Ed. 2d 153 (1992).
[22] *Lingle*, 544 U.S. at 539, 125 S. Ct. at 2082.

In summary, the federal courts do not recognize destroying a fundamental attribute of ownership, other than a physical occupation, as part of the takings analysis.[23] So it is wrong to say that Washington follows federal takings law as to this element of the state test.

This rule is harmful because it unnecessarily complicates Washington takings law and can result in a regulation being found unconstitutional under Washington law, but not federal law, even though this Court purports to follow federal law. If a regulation is found to destroy a fundamental attribute of ownership other than a physical invasion, a Washington "court proceeds with its taking analysis."[24] But it is still not a taking. If the regulation is found not to destroy a fundamental attribute of ownership, the regulation may still be a taking or it may not be a taking and the court then proceeds to the "second threshold question."[25]

Under the federal rule none of this extra analysis occurs; the court moves directly to the economic-deprivation rule or the *Penn Central* analysis.[26] Washington courts generally get to the *Penn Central* factors, but it takes longer and, potentially, can be derailed if the court concludes

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[23] *Lingle*, 544 U.S. at 538 – 40, 125 S. Ct. at 2081 – 82.
[24] *Guimont*, 121 Wn.2d at 603 – 04, 854 P.2d at 11.
[25] *Guimont*, 121 Wn.2d at 603, 854 P.2d at 10.
[26] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029, 112 S. Ct. 2886, 2900, 120 L. Ed. 2d 798 (1992); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978).

that the regulation does not "go[] beyond preventing real harm to the public which is directly caused by the prohibited use of the property …" under the "harm prevention" and "benefit conferral" dichotomy analysis discussed next.[27]

5. The U.S. Supreme Court rejected the "harm prevention" and "benefit conferral" dichotomy in takings law.

Washington takings law's "second threshold question" is does the regulation (i) safeguard the health, safety, the environment or fiscal integrity, or (ii) "seek[] less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit."[28] The *Lucas* Court referred to this rule as the "'harm prevention'/'benefit conferral' dichotomy."[29]

In the *Lucas* decision, the U.S. Supreme Court rejected the "harm prevention" and "benefit conferral" dichotomy because it was subject to being manipulated.[30] As the Court wrote:

> since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on

[27] *Guimont*, 121 Wn.2d at 603, 854 P.2d at 11.
[28] *Guimont*, 121 Wn.2d at 603, 854 P.2d at 10.
[29] *Lucas*, 505 U.S. at 1032 fn. 18, 112 S. Ct. at 2902.
[30] *Lucas*, 505 U.S. at 1024 & 1032 fn. 18, 112 S. Ct. at 2897 – 98 & 2902.

> Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.[31]

Therefore, it is wrong to require the "harm prevention" or "benefit conferral" dichotomy as part of Washington's takings analysis and say that Washington follows federal takings law. The harm of this rule is that is subject to manipulation.[32] If the U.S. Supreme Court had accepted this principle, the Court, presumably, could have justified the total takings of the Lucas property. Or not, it just depends on how the court looks at the regulation. So, it is not a solid foundation for a principled takings jurisprudence.

A greater harm can occur if a Washington court concludes that the regulation does not "go[] beyond preventing real harm to the public which is directly caused by the prohibited use of the property …."[33] If a court makes that conclusion it does not proceed to the *Penn Central* analysis under Washington law,[34] but would under federal takings law.[35] In that case, a state court may conclude there is no taking where a federal court

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[31] *Lucas*, 505 U.S. at 1024, 112 S. Ct. at 2897 – 98.
[32] *Lucas*, 505 U.S. at 1032 fn. 18, 112 S. Ct. at 2902.
[33] *Guimont*, 121 Wn.2d at 603, 854 P.2d at 11.
[34] *Guimont*, 121 Wn.2d at 603, 854 P.2d at 11.
[35] *Lingle*, 544 U.S. at 538 – 40, 125 S. Ct. at 2081 – 82; *Penn Cent.*, 438 U.S. at 124, 98 S. Ct. at 2659.

would apply the federal rule and find a taking under the *Penn Central* analysis. This is a serious problem for the Washington takings analysis because the "the federal constitution sets a minimum floor of protection, below which state law may not go."[36]

6. The U.S. Supreme Court has rejected the substantially advances legitimate state interests element and so should this Court.

Washington takings law borrowed the "substantially advances legitimate state interests" element from the U.S. Supreme Court's *Agins v. City of Tiburon* decision.[37] The U.S. Supreme Court has reversed this decision concluding "that the 'substantially advances' formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation."[38] The U.S. Supreme Court arrived at this conclusion because the "substantially advances" formula is "*doctrinally* untenable as a takings test" and its application as takings test presents serious practical difficulties.[39]

The test was *doctrinally* untenable for three reasons. First, the *Agins* "'substantially advances' formula was derived from due process, not

[36] *Orion Corp. v. State*, 109 Wn.2d 621, 652, 747 P.2d 1062, 1079 (1987).
[37] *Orion Corp.*, 109 Wn.2d at 647, 747 P.2d at 1076.
[38] *Lingle*, 544 U.S. at 545, 125 S. Ct. at 2085.
[39] *Lingle*, 544 U.S. at 544, 125 S. Ct. at 2085 italics in the original.

takings, precedents."[40] After *Agins* was decided, the U.S. Supreme Court clarified that "regulatory takings" claims are properly brought under the Takings Clause of the Fifth Amendment, not the Due Process Clause.[41] So due process precedents are inapplicable to takings analysis.

Second, the "'substantially advances' formula suggests a means-ends test:" Is a regulation of private property "*effective* in achieving some legitimate public purpose."[42] The Court wrote that this type of inquiry "has some logic" for a due process challenge because a "regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."[43] "But such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment."[44]

The third reason the U.S. Supreme Court rejected the "substantially advances" standard is the "test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property …."[45] In

[40] *Lingle*, 544 U.S. at 540, 125 S. Ct. at 2083.
[41] *Lingle*, 544 U.S. at 536 – 37 & 541, 125 S. Ct. at 2080 & 2083.
[42] *Lingle*, 544 U.S. at 542, 125 S. Ct. at 2083.
[43] *Id.*
[44] *Lingle*, 544 U.S. at 542, 125 S. Ct. at 2084.
[45] *Id.*

analyzing federal takings law, the Court wrote that the rules of *Loretto*, *Lucas*, and *Penn Central* aim

> to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. See *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831–832, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Loretto, supra*, at 433, 102 S.Ct. 3164; *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. See *Lucas, supra*, at 1017, 112 S.Ct. 2886 (positing that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation"). And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.[46]

The Court wrote that:

> In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about

[46] *Lingle*, 544 U.S. at 539 – 40, 125 S. Ct. at 2082.

> how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.[47]

The Court wrote that the practical problem with the "substantially advances" formula is that it

> can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.[48]

In *Lingle*, "the District Court was required to choose between the views of two opposing economists as to whether Hawaii's rent control statute would help to prevent concentration and supracompetitive prices in the State's retail gasoline market. Finding one expert to be 'more persuasive' than the other, the court concluded that the Hawaii Legislature's chosen regulatory strategy would not actually achieve its objectives."[49] The Supreme Court rejected this approach because the Court had "long eschewed such heightened scrutiny when addressing substantive due

[47] *Lingle*, 544 U.S. at 542, 125 S. Ct. at 2084.
[48] *Lingle*, 544 U.S. at 544, 125 S. Ct. at 2085.
[49] *Lingle*, 544 U.S. at 544 – 45, 125 S. Ct. at 2085.

process challenges to government regulation. See, *e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 – 125, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); *Ferguson v. Skrupa*, 372 U.S. 726, 730–732, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963). The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here."[50] So the Supreme Court held "the 'substantially advances' formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence."[51] So this element of Washington's takings analysis is wrong.

It is also harmful because as the U.S. Supreme Court recognized it requires the courts to "substitute" their judgments for that of the legislative and executive branches including the expert state agencies.[52] This interferes with the separation of powers and may lead to poor public policy if the legislature and governor are correct and some court decision is wrong. The Washington State Supreme Court should follow the U.S. Supreme Court.

[50] *Lingle*, 544 U.S. at 545, 125 S. Ct. at 2085.
[51] *Lingle*, 544 U.S. at 548, 125 S. Ct. at 2087.
[52] *Lingle*, 544 U.S. at 544, 125 S. Ct. at 2085.

B. The distinction between taking private property for a public or private use does not aid in determining if a taking has occurred.

1. Standard of Review.

"When interpreting constitutional provisions, we look first to the plain language of the text and will accord it its reasonable interpretation. … The words of the text will be given their common and ordinary meaning, as determined at the time they were drafted."[53]

2. The prohibition on taking of private property for private use in Article I, § 16 is properly applied to condemnations, not regulatory takings.

The Yims argue that the FIT Rule is a taking for private use.[54] The prohibition on taking private property for private use in Article I, § 16 of the Washington State Constitution originated with concerns "over the taking of private property for private enterprise."[55] And the prohibition is properly read as prohibiting condemning private property for private uses with certain exceptions.[56] For example, as "long as the property was

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[53] *Washington Off Highway Vehicle All.*, 176 Wn.2d at 234, 290 P.3d at 959.
[54] Respondents' Brief at 22.
[55] *Manufactured Hous. Communities of Washington v. State*, 142 Wn.2d 347, 359, 13 P.3d 183, 189 (2000).
[56] CONST. art. I, § 16.; *State ex rel. Washington State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 817, 966 P.2d 1252, 1255 (1998).
Petition of City of Seattle, 96 Wn.2d 616, 627 – 30, 638 P.2d 549, 556 – 58 (1981).

condemned for the public use, it may also be put to a private use that is merely incidental to that public use."[57]

When this rule is applied to regulations that do not condemn real property for private use, the provision has an "eye of the beholder" problem similar to the "harm prevention" and "benefit conferral" dichotomy rejected by the U.S. Supreme Court for that reason.[58] This problem is confounded by the fact that most regulated real property is private property used for the private purposes of those who own, lease, rent, or use the property, but with development restrictions.[59]

The difficulty of determining whether a land use regulation results in taking private property for a public or private use is illustrated by the *J.L. Storedahl & Sons, Inc. v. Cowlitz County* decision. J.L. Storedahl & Sons, Inc. applied for a permit to expand their 90.2 acre surface mine in Cowlitz County by approximately 16.2 acres.[60] The county regulations authorized the county to "approve the application subject to such conditions as may be necessary to assure that development will comply

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[57] *State ex rel. Washington State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 817, 966 P.2d 1252, 1255 (1998).
[58] *Lucas*, 505 U.S. at 1024 – 26, 112 S. Ct. at 2897 – 99.
[59] *See for example*, *Maple Leaf Inv'rs, Inc. v. State, Dep't of Ecology*, 88 Wn.2d 726, 733 – 34, 565 P.2d 1162, 1165–66 (1977).
[60] *J.L. Storedahl & Sons, Inc. v. Cowlitz Cty.*, 125 Wn. App. 1, 5, 103 P.3d 802, 803 (2004), *as amended on denial of reconsideration* (Dec. 21, 2004) *review denied J.L. Storedahl & Sons, Inc. v. Cowlitz Cty.*, 155 Wn.2d 1002, 122 P.3d 185 (2005).

with the Comprehensive Plan and will be compatible with other uses in the district and this chapter."[61] The county approved the permit with conditions and J.L. Storedahl & Sons, Inc. appealed. Among the conditions appealed were requirements to use "blasting mats during all blasting," "limiting blasting to beyond 300 feet of any residence or well," "expanding the buffer from 60 to 90 feet," and "limiting rock extraction to beyond 200 feet" from an existing well.[62] These conditions were required in part because a neighbor testified that debris from blasting had hit his wife, damaged neighboring houses, damaged cars on his property, "and knocked down his stacked stone wall three times."[63] The court upheld these conditions concluding they were supported by substantial evidence.[64] The court wrote "[t]hese conditions protect homeowners, the public, and the adjacent land, and all are reasonably related to the purpose of the County's Ordinance and Resolution."[65] While these county regulations and conditions protected the public, they also protected nearby private homeowners.

Was the private land in the mining and blasting setbacks and buffers taken for a private use because they protected other private

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[61] *Storedahl & Sons, Inc.*, 125 Wn. App. at 10, 103 P.3d at 806.
[62] *Storedahl & Sons, Inc.*, 125 Wn. App. at 11, 103 P.3d at 806.
[63] *Id.*
[64] *Storedahl & Sons, Inc.*, 125 Wn. App. at 12, 103 P.3d at 806.
[65] *Storedahl & Sons, Inc.*, 125 Wn. App. at 12 – 13, 103 P.3d at 806.

properties? It may have seemed that way in the eye of the mine owner who appealed the conditions. Based on the testimony and the prominence of "homeowners" in the court's decision, protecting private property was more than just incidental to protecting the public.

That is the harm in trying to apply the prohibition on taking private property for private use to regulations and conditions designed to protect other nearby private uses. The Court should limit the prohibition on taking private property for private use in Article I, § 16 to condemnations.

V. CONCLUSION

For the reasons argued above, the Washington State Supreme Court should take this opportunity to bring Washington takings law into alignment with the U.S. Constitution. This will reduce confusion over Washington takings law and better protect property owners and the public.

Respectfully submitted on this 26th day of April 2019.

Tim Trohimovich, WSBA No. 22367

CERTIFICATE OF SERVICE

I, Tim Trohimovich, declare under penalty of perjury and the laws of the State of Washington that, on April 26, 2019, I caused a PDF file of the original and true and correct copies of the following documents to be served on the persons listed below in the manner shown: The ***Amicus Curiae* Brief of Futurewise in Case No. 95813-1** and the **Motion of Futurewise for Permission to File an *Amicus Curiae* Brief in Case No. 95813-1.**

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